Office-Supreme Court, U.S.
FILED
MAY 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-846

In the Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, WARDEN, PETITIONER

v.

NOAH H. LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will discuss the following question, which constitutes a restatement of Question 2 in the certiorari petition:

Whether a prisoner collaterally attacking his conviction may be granted relief on the basis of instances of alleged prosecutorial misconduct neither objected to at trial nor raised on direct appeal, without showing "cause" for the failure to make timely objections and "prejudice" resulting from the alleged errors.

TABLE OF AUTHORITIES

Page

Cases:

Bihn v. *United States*, 328 U.S. 633 12

Davis v. *United States*, 411 U.S. 233 ..... 4, 8

Estelle v. *Williams*, 425 U.S. 501 ..... 8, 11

Fay v. *Noia*, 372 U.S. 391 14

Francis v. *Henderson*, 425 U.S. 536 ..... 4, 8

Harrison v. *State*, 532 S.W.2d 566 13

Hawkins v. *State*, 543 S.W.2d 606 13

Henderson v. *Kibbe*, 431 U.S. 145 13

Kirby v. *State*, 214 Tenn. 296, 379 S.W.2d 780 11

Manning v. *State*, 500 S.W.2d 913 13

Manning v. *State*, 195 Tenn. 94, 257 S.W.2d 6 11

McDonald v. *State*, 512 S.W.2d 636 13

Parton v. *State*, 445 S.W.2d 645 11

Pulley v. *State*, 506 S.W.2d 164 13

Sneed v. *State*, 546 S.W.2d 254 11

State v. *McKinney*, 603 S.W.2d 755 10

Stone v. *Powell*, 428 U.S. 465 ..... 13, 14

Sumner v. *Mata*, No. 79-1601 (Jan. 21, 1981) 14

Sunal v. *Large*, 332 U.S. 174 14

Taylor v. *Harris*, 640 F. 2d 1 ..... 8, 15

Page

Cases—(Continued):

Tyler v. *Phelps*, No. 79-3093 (5th Cir. Apr. 27, 1981) 12

Ulster County Court, New York v. *Allen*, 442 U.S. 140 15

United States v. *Addonizio*, 442 U.S. 178 13

United States v. *Frady*, 636 F. 2d 506, petition for cert. pending, No. 80-1595 (filed Mar. 20, 1981) 2, 9

United States v. *Indiviglio*, 352 F. 2d 276, cert. denied, 383 U.S. 907 1

Wainwright v. *Sykes*, 433 U.S. 72 .... 4-5, 8, 9, 15

Yakus v. *United States*, 321 U.S. 414 8

Statutes and rules:

28 U.S.C. 2254 ..... 3, 4, 5, 8, 12

Rules Governing Section 2254 Cases in the United States District Courts (28 U.S.C. 2254 note):

Rule 9(a) 9

Rule 11 12

28 U.S.C. 2255 8

Tenn. Code Ann. (repl. 1975):

§ 39-707 2

§ 39-3701 2

§ 40-3801 *et seq.* 2

Page

Statutes and rules—(Continued):

Fed. R. Crim. P.:
Rule 12 ..... 1, 8
Rule 30 1
Rule 52(b) 1, 4, 12, 13
Fed. R. Evid. 103(a)(1) 1
Tenn. Code Ann., Court Rules (Vol. 5A) (repl. 1977):
Sup. Ct. R.:
Rule 14(4) 10, 13
Rule 14(5) 11, 13
Crim. App. Ct., Rules of Practice 10
Tenn. R. App. P., *reprinted in* Tennessee Rules of Court-1980:
Rule 3(e) 11
Rule 36(a) 11
Tenn. Sup. Ct. R. Amendments, 610 S.W.2d No. 4 (Tenn. ed. Mar. 17, 1981) 11

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-846

JIM ROSE, WARDEN, PETITIONER

v.

NOAH H. LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case raises an important question concerning the availability of federal habeas corpus relief when a defendant has failed to comply with legitimate procedural rules requiring that objections be raised in a timely fashion or be deemed waived. The Federal Rules of Criminal Procedure expressly provide that certain types of motions and objections must be made at or before trial. See Fed. R. Crim. P. 12, 30; see also Fed. R. Evid. 103(a)(1). More generally, a criminal defendant's failure to make timely objection in the trial court is frequently held to bar assertion of error on direct appeal, *e.g.*, *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966),

although an appellate court may sometimes notice plain errors affecting substantial rights (Fed. R. Crim. P. 52(b)). The standard for determining whether errors not duly objected to at trial or raised on direct appeal can nevertheless support collateral relief is an issue of substantial importance to the administration of justice in the federal system. See, *e.g.*, *United States* v. *Frady*, 636 F. 2d 506 (D.C. Cir. 1980), petition for cert. pending, No. 80-1595 (filed Mar. 20, 1981).

Contrary to the assumption of the court of appeals in this case (Pet. App. A-3), most of the asserted errors relied on by the district court were neither raised nor considered in the state court proceedings and, indeed, would have been barred from consideration on direct appeal by the Rules of the Tennessee Court of Criminal Appeals. If this Court reaches the second question presented for review in the petition for certiorari, it will consider an issue that is of substantial importance to the administration of criminal justice in both federal and state proceedings.

STATEMENT

Following a jury trial in the Knox County Criminal Court in Knoxville, Tennessee, respondent was convicted of rape, in violation of Tenn. Code Ann. § 39-3701 (repl. 1975), and a crime against nature, in violation of Tenn. Code Ann. § 39-707 (repl. 1975). Respondent's motion for a new trial was denied. He was sentenced to a term of 120 years' imprisonment on the rape conviction and five to 15 years on the crime against nature conviction, the sentences to run consecutively (Pet. App. A-15). The Tennessee Court of Criminal Appeals affirmed the convictions (*id.* at A-14 to A-23), and the Tennessee Supreme Court denied review (*id.* at A-24). Respondent then sought post-conviction relief in the state trial court (see Tenn. Code Ann. § 40-3801 *et seq.* (repl. 1975)), which was denied after a hearing (J.A. 62-63).

Next, respondent filed a petition for federal habeas corpus (28 U.S.C. 2254) in the United States District Court for the Middle District of Tennessee, asserting four grounds for relief: (1) that the state trial judge had violated his rights under both the federal and Tennessee Constitutions by limiting cross-examination of the victim (J.A. 71); (2) that the prosecutor's comment concerning respondent's "violent nature" and the prosecutor's attempt to introduce evidence to that effect violated his right to a fair trial (J.A. 72-74); (3) that the prosecutor improperly commented on his failure to testify (J.A. 74); and (4) that the trial court's instructions to the jury violated his right to due process (J.A. 74-75). Because the third and fourth claims had never been raised in any state court, the district court stated that it would (Pet. App. A-7) "not consider them in the constitutional framework," but added that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally" (*ibid.*).

The district court apparently accepted the state court of appeals' conclusion that the limitation on cross-examination of the victim had been erroneous but, without discussion, rejected that court's conclusion that respondent had suffered no prejudice and that the error was "harmless in the context of this case" (Pet. App. A-22 to A-23). The district court did not directly address respondent's contention that the limitation on cross-examination violated his constitutional rights. Instead, after specifying a number of remarks by the prosecutor that it deemed improper, the court concluded (*id.* at A-12): "Under the charge as given, the limitation of cross-examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct." Much of the "flagrant prosecutorial misconduct" relied on by the district court was neither

objected to at trial nor challenged on direct appeal (or, indeed, even raised in the Section 2254 petition).

On appeal, the Sixth Circuit affirmed, rejecting, *inter alia*, Tennessee's contention that *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), barred relief. According to the court of appeals (Pet. App. A-3), "the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule * * * but * * * proceeded to consider [the claims] on the merits."

SUMMARY OF ARGUMENT

Contrary to the assumption of the court of appeals, much of the prosecutorial misconduct relied on by the district court was never challenged in or considered by any state court. The district court's decision, therefore, apparently rests upon the notion that some variant of the "plain error" doctrine (see Fed. R. Crim. P. 52(b)) is applicable on collateral attack.

This Court's decisions in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), *Francis* v. *Henderson*, 425 U.S. 536 (1976), and *Davis* v. *United States*, 411 U.S. 233 (1973), have established "cause and prejudice" as the appropriate standard for determining when a federal court may consider claims of error on collateral attack, notwithstanding a petitioner's failure to make timely objection in accordance with legitimate procedural rules. Application of the "plain error" doctrine on collateral attack is wholly inconsistent with the "cause and prejudice" standard and effectively frustrates the salutary policies that support contemporaneous objection rules.

Rules requiring a criminal defendant to make timely objection to claimed trial errors or forego the claims contribute significantly to the finality of criminal convictions and assume that the trial is the "main event" rather than a "tryout on the road" (*Wainwright* v. *Sykes*, *supra*, 433 U.S.

at 90). Even on direct appeal, contemporaneous objection requirements should not be lightly discarded in view of the important role they perform in our adversary system. A timely objection will often serve to prevent the occurrence of error, to avoid repetition of similar errors during the remainder of a trial, or to prompt the giving of a curative instruction that would reduce the impact of any error that has occurred. The reluctance to set aside a criminal conviction on the basis of error that was not objected to at trial is even more appropriate on collateral attack than on direct appeal, since collateral attacks are usually adjudicated long after the initial trial, when reprosecution may be impossible.

In a proceeding under Section 2254, a federal habeas court may consider only those claims that were actually decided by the state courts or those claims that were properly preserved. Even if the state appellate courts could have exercised discretion to ignore a procedural default on direct appeal, a federal habeas court may consider claims that were not seasonably raised and preserved at trial only if the petitioner demonstrates both "cause" for his default and actual prejudice. The concept of "plain error" simply has no appropriate application on collateral attack.

ARGUMENT

COLLATERAL RELIEF FROM A CRIMINAL CONVICTION MAY NOT ORDINARILY BE GRANTED ON THE BASIS OF TRIAL ERRORS TO WHICH NO OBJECTION WAS MADE, IN THE ABSENCE OF A SHOWING OF "CAUSE" FOR THE FAILURE TO MAKE OBJECTION

1. In a somewhat opaque opinion that does not entirely make clear the grounds for decision, the district court has set aside respondent's conviction on account of various instances of alleged prosecutorial misconduct during the trial. Ten instances of misconduct are specified (Pet. App. A-8 to A-11). Seven of these—paragraphs (1) and (3)

through (8)—all relate to the prosecutor's assertion at trial that it had been improper for defense counsel to interview the rape victim without disclosing to her that he was respondent's attorney. This objection by the prosecutor, which the state appellate court held to have been unfounded, led to the erroneous restriction of defense cross-examination regarding the prosecutrix's prior "inconsistent" statements to the attorney. The Tennessee Court of Criminal Appeals held this error to have been harmless in the circumstances of the case (Pet. App. A-23).

The district court also specified, in paragraph (9) (Pet. App. A-9), the prosecutor's statement in the presence of the jury referring to respondent's "violent nature." This statement was made in connection with the prosecution's unsuccessful attempt to introduce evidence regarding the relationship between respondent and the sister of a prosecution witness. Objection was made and sustained to the materiality of the proffered evidence, but the trial court denied respondent's motion for a mistrial because of the prosecutor's comment (J.A. 16-23). The prosecutor's comment was assigned as error on appeal (J.A. 43-45), but the court, while agreeing that the comment was improper, found the error to be harmless beyond a reasonable doubt (Pet. App. A-20).[1]

---

[1] In his brief in the Tennessee Court of Criminal Appeals, respondent asserted (J.A. 46) that "it becomes apparent from looking at the record as a whole that there was a certain amount of misconduct engaged in by the State's counsel." But, as noted above, the only specific misconduct mentioned (J.A. 46-48) was the prosecutor's assertion that it was improper for defense counsel to interview the victim without identifying himself as the attorney for respondent or having a member of the prosecutor's office present and the prosecutor's comment concerning respondent's "violent nature" (J.A. 43-45).

Respondent's petition for review in the Tennessee Supreme Court included the following statement (J.A. 50): "Petitioner would ask the court to review those parts of this record involving statements by [the]

Finally, in paragraphs (2) and (10), the district court identified 11 other statements by the prosecutors, one during the taking of testimony and the others during closing argument, that the court held to constitute improper "testimony" by the prosecutor. With one exception, no objection was made at trial to any of these prosecutorial comments, nor do they appear to have been assigned as error or addressed by the state appellate courts.[2]

Since the federal district court, in granting collateral relief, did not consider the correctness of the state appellate court's harmless error findings with regard to those instances of prosecutorial impropriety that were challenged on direct appeal, we infer that the grant of relief was predicated in substantial part upon the findings of improper prosecutorial comment contained in paragraphs (2) and (10). We assume for purposes of this brief that the district court was correct in concluding that the comments were improper, and we further assume that, had timely objection been made and the claim raised on appeal, respondent would have been entitled to reversal of his conviction on federal constitutional grounds (although we believe a harmless error conclusion might still have been sustainable). Our submission is that, in light of the procedural default under Tennessee practice brought about by the failure to object, federal collateral relief is barred unless the "cause and prejudice" standard enunciated by this Court in prior cases has been satisfied.

Attorney General upon making Motions, attempting to offer proof which was without question inadmissible and particularly following the objection to cross-examination of the prosecutrix and during the final argument." The Tennessee Supreme Court's denial of review is obviously not a ruling on the merits of respondent's general assertion of error.

[2]Respondent did object to the comment specified (Pet. App. A-11) as (j) in the district court's decision. The objection was sustained and the jury immediately instructed to disregard the statement (*ibid.*). This ground was not, however, assigned as error on direct appeal.

2. This Court has held that a failure to make timely objection, which results in a waiver of the claim on direct appeal under legitimate procedural rules, also bars the claim on collateral attack pursuant to 28 U.S.C. 2254 and 2255, unless the petitioner establishes sufficient "cause" for his failure to make timely objection and "actual prejudice." See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973); cf. *Yakus* v. *United States*, 321 U.S. 414, 444 (1944);[3] see also *Taylor* v. *Harris*, 640 F. 2d 1 (2d Cir. 1981). Although the "cause and prejudice" standard announced in *Davis* has its origins in Fed. R. Crim. P. 12, it has been "incorporated directly into the body of law governing the availability of federal habeas corpus review." *Wainwright* v. *Sykes, supra*, 433 U.S. at 85; see *Francis* v. *Henderson, supra*, 425 U.S. at 542.

Substantial policy considerations underlie procedural default rules. First and foremost, the making of a timely and adequately explicated objection will often prevent the commission of error in the first place, or, failing that, will at least permit use of a corrective measure such as an instruction to the jury, as well as reducing the likelihood that there will be further instances of similar errors. See *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3, 512 (1976). In the present case, for instance, where the district court apparently found a constitutional violation produced by the cumulative effect of a number of instances of improper prosecutorial comment, a timely objection might well have been effective to prevent the objectionable statements from being repeated and to cause the trial court to give an instruction reminding

---

[3] "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States, supra*, 321 U.S. at 444.

the jury that the statements of counsel were not to be considered as evidence.

Apart from reducing the likelihood that error will be cured or avoided, the failure to raise any objection is often strong indication that an error that may appear significant on the cold record before a reviewing court was in fact not particularly important or damaging to the non-objecting party.[4]

Because a collateral attack can be made at any time, months or even years after the trial, both the difficulty of adjudication of the legal claim and the consequences of a grant of relief are greatly magnified as compared to the direct appeal setting. Consequently, the justification for enforcing waivers resulting from procedural defaults is even greater on collateral attack than on direct appeal. In some instances, the defendant's procedural default concerns a matter—such as a motion to suppress evidence on Fourth Amendment grounds or to exclude a confession—that can only be resolved by means of an evidentiary hearing. The failure to make a timely request for relief of this nature will often cause serious difficulties in determining the validity of the request long after the critical events have taken place. See *Wainwright* v. *Sykes, supra*, 433 U.S. at 88; see also Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. But even if, as here, the errors are gleaned from the face of the trial record, the task of reprosecution if the original conviction is set aside is greatly complicated by problems of unavailable witnesses, misplaced, returned, or destroyed physical evidence, and dimmed memories.

---

[4]This is, in our view, the case with the erroneous jury instruction that provided the basis for collateral relief in *United States* v. *Frady*, 636 F. 2d 506 (D.C. Cir. 1980), petition for cert. pending, No. 80-1595 (filed Mar. 20, 1981).

The foregoing considerations have led this Court to hold that the failure to raise a claim in accordance with legitimate procedural rules will bar consideration of the claim in a collateral attack upon a criminal conviction unless the prisoner can satisfy the "cause and prejudice" standard. Since neither the district court nor the court of appeals applied that standard to respondent's claims, the judgment of the court of appeals cannot stand.

3. As noted above, much of the "flagrant prosecutorial misconduct" referred to by the district court (Pet. App. A-8 to A-11) was not objected to at trial or raised in respondent's motion for a new trial.[5] The lack of objection at trial ordinarily bars appellate relief in Tennessee. By order dated July 6, 1967, the Court of Criminal Appeals of Tennessee adopted "the existing rules of appellate practice of the Supreme Court of Tennessee * * * as the Rules of Practice of the Court of Criminal Appeals of Tennessee" (Tenn. Code Ann., Court Rules (Vol. 5A), at 163 (repl. 1977)). At the time of respondent's trial and direct appeal, Rule 14(4) (Tenn. Sup. Ct. R.) provided in pertinent part as follows (*id.* at 11):

> No assignment of error in any civil or criminal case * * * brought to this Court for review, can be predicated upon any alleged error of the trial court consisting of an omission or affirmative action * * * in the

---

[5]Respondent's "Amended Motion for New Trial" stated that "the improper comments, actions, and arguments of the Attorneys General throughout the entire trial and arguments were such as to inflame the jury and deny the defendant a fair and impartial trial." Not only did this claim come too late to permit correction of any errors during the trial, but so general an assertion is insufficient to preserve the claimed errors for review on direct appeal under Tennessee practice. See, *e.g.*, *State* v. *McKinney*, 603 S.W.2d 755, 759-760 (Tenn. Crim. App. 1980).

Copies of respondent's motion for a new trial and his amended motion have been lodged with the clerk of this Court.

> conduct of the case, unless it affirmatively appears in the record that the omission, action, defect, or error was seasonably called to the attention of the trial judge and ruled on adversely to the plaintiff in error, otherwise the same will be treated as having been waived or cured in the trial court.[6]

Thus, under Tennessee practice, the failure to raise a claim in the trial court in a timely fashion generally bars consideration of the issue on appeal. See, *e.g.*, *Kirby* v. *State*, 214 Tenn. 296, 379 S.W.2d 780 (1964); *Manning* v. *State*, 195 Tenn. 94, 257 S.W.2d 6 (1953); *Sneed* v. *State*, 546 S.W.2d 254 (Tenn. Crim. App. 1976); *Parton* v. *State*, 455 S.W.2d 645 (Tenn. Crim. App.1970).[7] Absent a showing of "cause and prejudice," therefore, the claims should also be barred on collateral attack in federal court pursuant

---

[6]See also Rule 14(5) (Tenn. Sup. Ct. R.): "Error in the admission or exclusion of testimony in charging a jury, * * * misconduct of jurors, parties or counsel, or other action occurring or committed on the trial of the case, civil or criminal, or other grounds upon which a new trial is sought, will not constitute a ground for reversal, and a new trial, unless it affirmatively appears that the same was specifically stated in the motion made for a new trial in the lower court, and decided adversely to the plaintiff in error, but will be treated as waived * * *. This is a court of appeals and errors, and its jurisdiction can only be exercised upon questions and issues tried and adjudged by inferior courts, the burden being upon the appellant, or plaintiff in error, to show the adjudication, and the error therein, of which he complains."

We are informed that the Rules of the Tennessee Supreme Court have been amended, effective January 28, 1981. See 610 S.W.2d No. 4 ((Tenn. ed.) Mar. 17, 1981). We are advised that these amendments make no material change in the rules relevant to this situation. See Rules 3(e) and 36(a), Tennessee Rules of Appellate Procedure (effective July 1979), *reprinted in* Tennessee Rules of Court-1980, at 245-246, 295.

[7]Tennessee happens to have a rule that specifically bars assignment of error on the basis of any claims not properly raised in the trial court. We submit, however, that the cause and prejudice standard should be applicable even if case law rather than a specific rule treats a claim as waived absent timely objection. Cf. *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring); *id.* at 508 n.3, 512.

to 28 U.S.C. 2254. *E.g., Tyler* v. *Phelps*, No. 79-3093 (5th Cir. Apr. 27, 1981), slip op. 6450, 6455-6457 & n.9 (on rehearing); *Taylor* v. *Harris, supra*. Thus, the only grounds for relief upon which the district court could have properly relied were (1) the limitation on cross-examination and (2) the prosecutor's comments that the interview was "improper" and that respondent's "violent nature" was material (assuming that these occurrences infringed some constitutional guarantee). But, of course, it could not properly grant relief on the basis of those errors without addressing the conclusion of the Tennessee Court of Criminal Appeals that they were harmless.

4. Although the district court did not expressly refer to the "plain error" doctrine, its apparent "quest for error" (*Bihn* v. *United States*, 328 U.S. 633, 638 (1946)) can only be explained on the theory that some form of that doctrine was thought to be properly applicable in this proceeding.[8] We submit that the plain error doctrine has no place in consideration of a collateral attack on a criminal conviction, and that its use would have the effect of obliterating the distinctions between direct and collateral review of criminal convictions, thereby unjustifiably increasing the vulnerability of otherwise final judgments in criminal cases. Moreover, the notion that collateral relief may be granted on the basis of errors that are plain on the face of the record, without regard to the obligations of litigants in our adversarial system to make timely objection to matters deemed erroneous and prejudicial, simply cannot be squared with the decisions of this Court in cases like *Davis*, *Francis*, and *Wainwright*.

---

[8]Fed. R. Crim. P. 52(b) is, of course, inapplicable. See generally Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts.

The plain error doctrine has evolved by rule (*e.g.*, Fed. R. Crim. P. 52(b)) and practice[9] as a power of an appellate court reviewing a criminal conviction on direct appeal, and its application should be confined to its intended context. It allows courts, in the context of trial and direct appeal, to recognize and correct obvious errors notwithstanding a party's failure to make appropriate objection or seek appellate review of the matter. This power may be exercised essentially without regard to the existence of any excuse or justification for the party's dereliction. Plain error is in this respect materially different from the "cause and prejudice" standard, which requires the party seeking collateral relief to provide a satisfactory explanation for any procedural default before the habeas court may consider the merits of a defaulted claim. If plain error may, without more, afford a basis for collateral relief, then the "cause" component of the "cause and prejudice" standard will be eliminated for a substantial class of cases.

It is true that the consequence of barring use of a plain error standard on collateral attack and insisting upon compliance with the cause and prejudice standard will be to limit the availability of collateral relief from final judgments of conviction in criminal cases. But this is as it should be, for direct appeal and collateral attack are fundamentally different remedies. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 184-187 & n.11 (1979); *Henderson* v. *Kibbe*, 431

---

[9]Although there does not appear to be any rule authorizing consideration of claims barred by Rules 14(4) and (5) on the basis of "plain error," Tennessee appellate courts do have limited discretion to consider "patent invalidating error," *Harrison* v. *State*, 532 S.W.2d 566, 569 (Tenn. Crim. App. 1975); see *McDonald* v. *State*, 512 S.W.2d 636, 640 (Tenn. Crim. App. 1974); *Pulley* v. *State*, 506 S.W.2d 164, 166 (Tenn. Crim. App. 1973), or "plain error" affecting the fairness or integrity of the proceedings, see *Hawkins* v. *State*, 543 S.W.2d 606, 607 (Tenn. Crim. App. 1976). See generally *Manning* v. *State*, 500 S.W.2d 913, 914-915 (Tenn. 1973).

U.S. 145 (1977); *Stone* v. *Powell*, 428 U.S. 465 (1976). Since "the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal," *Sunal* v. *Large*, 332 U.S. 174, 178 (1947), the liberality of the plain error doctrine properly gives way to more stringent standards for access to collateral relief.

Use of the "plain error" standard is particularly inappropriate when a federal court is asked to nullify a state criminal conviction. For such an exercise of power not only impairs society's interest in the effective utilization of scarce judicial resources and in the finality of criminal judgments, but also exacerbates the friction inherent in a federal system and interferes with the constitutional balance implicit in the doctrine of federalism. See *Stone* v. *Powell, supra*, 428 U.S. at 491 n.31; see also *Sumner* v. *Mata*, No. 79-1601 (Jan. 21, 1981) slip op. 10-11 & n.3; *Fay* v. *Noia*, 372 U.S. 391, 463-470 (1963) (Harlan, J., dissenting).[10]

---

[10]There may be exceptional cases in which the number and significance of the claims not raised as required by legitimate procedural rules will be sufficient to indicate that the defendant's trial counsel failed to display the degree of care and competence required of attorneys. In such cases a federal habeas court might properly consider the claims of error notwithstanding the procedural defaults, the attorney's manifest incompetence constituting sufficient "cause." Neither the trial court nor the Sixth Circuit rested its decision on any such ground, which would in any event be of doubtful validity in the circumstances of this case. See J.A. 62-63.

In sum, a federal habeas court does not sit as a surrogate for the state appellate court, reviewing the record for any error that might have been considered on direct appeal. Accordingly, even if an appellate court might properly have considered certain errors pursuant to some doctrine akin to "plain error" on direct appeal, absent a showing of "cause and prejudice" a federal habeas court may not do so. See *Taylor* v. *Harrison, supra*, 640 F. 2d at 2 n.3.[11]

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be vacated or reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

MAY 1981

---

[11] If the state court actually considered and decided the issue notwithstanding a procedural default, other considerations are applicable and the claim may be reviewed. *E.g., Ulster County Court, New York* v. *Allen*, 442 U.S. 140, 148-154 (1979); *Wainwright* v. *Sykes, supra*, 433 U.S. at 80, 87. If the state has a procedural rule that bars assertion of untimely claims and the state courts have not in fact considered the issue, however, the "cause and prejudice" standard is applicable.